APPEALS BOARD
UTAH LABOR COMMISSION

DOUGLAS R. DAVIS, **Petitioner,** **vs.** **UTAH AUTO AUCTION and AMERICAN HOME ASSURANCE,** **Respondents.**	**ORDER AFFIRMING ALJ'S DECISION** **Case No. 04-0904**

Utah Auto Auction and its insurance carrier, American Home Assurance (referred to jointly as "Utah Auto" hereafter), ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Marlowe's award of benefits to Douglas R. Davis under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated §63-46b-12 and §34A-2-801(3).

BACKGROUND AND ISSUES PRESENTED

Mr. Davis claims benefits for a back injury that occurred as he was working for Utah Auto on March 15, 2004. Utah Auto denied liability on the theory that Mr. Davis's work was not the legal cause of the back injury. Judge George held an evidentiary hearing on Mr. Davis's claim and then referred certain aspects of the claim to a medical panel. However, Judge George retired before the panel issued its report and Judge Marlowe assumed responsibility for adjudicating Mr. Davis's claim. After receiving the panel's report, Judge Marlowe issued her decision awarding benefits to Mr. Davis.

In challenging Judge Marlowe's decision, Utah Auto argues that no medical panel referral was necessary and that Mr. Davis's claim should have been denied after the evidentiary hearing for lack of legal causation. Alternatively, Utah Auto argues that, if a medical panel was necessary, the panel should have been asked to determine whether Mr. Davis had a preexisting condition that contributed to his alleged work injury. Finally, Utah Auto contends it was denied due process because the ALJ who conducted the hearing was not the same ALJ who made the medical panel referral and issued the decision.

FINDINGS OF FACT

The following facts are material to the issues raised by Utah Auto's motion for review. The Appeals Board also adopts Judge Marlowe's findings of fact to the extent they are consistent herewith.

Mr. Davis injured his back in 1998, while working for an employer other than Utah Auto. This injury was at the L4-5 level of his spine and resulted in a permanent 5% whole person impairment. Thereafter, he received periodic medical care for his low back, including an MRI on March 15, 2003, that showed a "minimal central bulge without evidence of protrusion" at the L2-3 level of his spine. This same MRI showed various defects and degenerative disc disease at the L3-4 level of the spine.

On March 15, 2004, while working for Utah Auto, Mr. Davis was standing outside a car. He opened the door, moved the front seat forward, and reached into the back seat to retrieve a small electronic device weighing about 3½ pounds. As Mr. Davis stood up, he felt immediate pain in his low back. He was later diagnosed with a disc herniation at the L2-3 level of his spine.

All the physicians who have treated or examined Mr. Davis agree that the L2-3 herniation was medically caused by Mr. Davis's exertion in reaching into the backseat of the car at Utah Auto on March 15, 2004. None of the treating or examining physicians have expressed the opinion that Mr. Davis's preexisting back problems contributed to his work-related injury on March 14, 2004.

DISCUSSION AND CONCLUSIONS OF LAW

As already noted, Utah Auto argues that Judge George should have denied Mr. Davis's claim at the conclusion of the evidentiary hearing for lack of legal causation. Alternatively, Utah Auto argues that Judge George should have asked the medical panel to determine whether Mr. Davis's preexisting condition contributed to the injury he suffered at Davis Auto on March 15, 2004. Both of these arguments must be considered in light of the medical evidence and opinion the parties have submitted to the Commission.

Denial for lack of legal causation. Section 34A -2-401 of the Utah Workers' Compensation Act provides medical and disability benefits to employees injured by accident "arising out of and in the course of" employment. In *Allen v. Industrial Commission*, 729 P.2d at 26, the Utah Supreme Court held that an injury "arises out of" employment when the work-related event or exertion is both the "legal cause" and the "medical cause" of the injury. The *Allen* decision also established alternate tests for legal causation, depending on whether the injured worker suffered from a preexisting condition that

contributed to his work injury. These alternate tests were described by the Supreme Court in *Price River Coal Co. v. Industrial Commission*, 731 P.2d 1079, 1082 (Utah 1986), as follows:

> Under Allen, a usual or ordinary exertion, so long as it is an activity connected with the employee's duties, will suffice to show legal cause. However, if the claimant suffers from a pre-existing condition, then he or she must show that the employment activity involved some unusual or extraordinary exertion over and above the "usual wear and tear and exertions of nonemployment life." . . . . (Citations omitted.)

However, not every pre-existing condition will trigger application of the more stringent "unusual or extraordinary exertion" test for legal causation. As the Utah Court of Appeals stated in *Nyrehn v. Industrial Commission*, 800 P. 2d 300, 334 (Utah App. 1990) (emphasis added):

> [The Commission] may not simply presume that the finding of a preexisting condition warrants application of the Allen test. **An employer must prove medically** that the claimant 'suffers from a preexisting condition which **contributes** to the injury**.'** (Citations omitted; emphasis added.)

In this case, Utah Auto argues that, at the conclusion of the evidentiary hearing, Mr. Davis's claim should have been dismissed because it did not meet the more stringent prong of the *Allen* tests for legal causation. In light of the appellate precedent cited above, Utah Auto can only prevail on this argument if, at the conclusion of the hearing, the evidence established each of the following elements: 1) Mr. Davis had a preexisting condition; 2) the preexisting condition contributed to Mr. Davis's work injury; and 3) Mr. Davis's exertions at Utah Auto were not unusual or extraordinary.

There is no question that the first of these three elements is satisfied--Mr. Davis had preexisting back problems prior to the injury at Utah Auto. However, the second requirement—that the preexisting condition **contributed** to the subject injury-- has not been met. No medical expert has expressed the opinion that Mr. Davis's preexisting back conditions contributed to the L2-3 herniation that occurred at Utah Auto on March 15, 2004. The closest that any medical expert comes to expressing such an opinion is Dr. Shepherd's comment that "[w]hile mild degenerative changes at L2-3 **may** have been a precursor or **possibly** predisposed [Mr. Davis] to some further symptoms, I cannot state with medical certainty that they were the predominant or proximate cause of his disc extrusion at L2-3." (Emphasis added.) Dr. Shepherd's observation is stated in equivocal and uncertain terms, as a possibility rather than a probability. Such an opinion is insufficient to constitute medical proof that Mr. Davis's preexisting back problems actually contributed to his work injury at Utah Auto Auction. The Appeals Board therefore concludes that Judge George properly declined to dismiss Mr. Davis's claim on the basis of Dr. Shepherd's speculative opinion.

Referral to medical panel. Judge George appointed a medical panel to address the issue of medical causation, but did not ask the panel to consider the issue of legal causation, i.e., whether Mr. Davis's preexisting back problems contributed to the low back injury he suffered at Utah Auto.

Utah Auto argues that the medical panel should have been asked to address the issue of legal causation.

Section 34A-2-601(1)(a) of the Utah Workers' Compensation Act allows the Commission's administrative law judges to appoint an impartial medical panel to assist in evaluating medical issues presented by workers' compensation cases. The Commission's Rule 602-2-2.A provides guidance for the appointment of such medical panels:

> A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are . . . [c]onflicting medical opinions related to causation of the injury or disease . . . .

It is clear from the foregoing rule that medical panels are intended to assist the Commission in resolving medical controversies created by conflicting medical reports. It is not the purpose of medical panels to create controversies. As the record stood at the conclusion of the evidentiary hearing in this matter, Utah Auto had submitted no medical evidence or opinion that Mr. Davis's preexisting condition contributed to his subsequent injury at Utah Auto. In the absence of such evidence, it was unnecessary to ask the medical panel to consider that issue.

Due process. As a final matter, the Appeals Board considers Utah Auto's argument that it was denied due process because responsibility over this case was transferred from Judge George to Judge Marlowe. Specifically, Utah Auto argues that Judge George, who conducted the hearing, would have asked different questions to the panel than were posed by his successor. However, the record establishes that it was, in fact, Judge George, who appointed the medical panel and devised the questions to be submitted to the panel. Thus, the factual premise of Utah Auto's argument is incorrect. The Appeals Board also notes that Judge Marlowe had access to the entire record of this proceeding, including the evidentiary hearing. Her ultimate decision is supported by the evidence and applicable law. Under these circumstances, the Appeals Board finds no basis to conclude that Utah Auto was denied due process.

ORDER

The Appeals Board affirms Judge Marlowe's decision. It is so ordered.

Dated this 31st day of May, 2007.

_____
Colleen S. Colton, Chair

_____
Patricia S. Drawe

_____
Joseph E. Hatch